

Evidence

Presented by:
Judge Jack Nevin



Step 1

- Do the evidence rules apply?
- Rule 104(a)
 - Qualification of a witness
 - Existence of a privilege
 - Admissibility of evidence
- Only rule that does apply is privilege

“YOUR HONOR, I OBJECT ON
THE BASIS OF RELEVANCE.”

“YOUR HONOR, I OBJECT,
THE QUESTION CALLS FOR
TESTIMONY THAT IS IMMATERIAL
TO THE ISSUES IN THIS CASE.”

Two-Prong Analysis

STEP 1: Rule 401

a. Tendency to prove or disprove a fact.

and

b. Is that fact of some consequence?

a. = Probative

b. = Materiality

Step 2

Rule 402 THEREFORE, ADMISSIBLE
(ABSENT ANOTHER BASIS).

- Probative: “Any tendency.”
- Litmus: “Minimal logical relevance.”

HYPOTHETICAL



- Defendant is stopped for investigation of assault. He gives a wrong name.
- Relevant?

Rule 403

- “YOUR HONOR, EVEN THOUGH YOU HAVE FOUND RELEVANCE, IT’S PROBATIVE VALUE IS FAR OUTWEIGHED BY ITS PREDJUDICIAL EFFECT.”
- LITMUS: “AROUSE AN EMOTIONAL RESPONSE RATHER THAN A RATIONAL DECISION.”

Possible Responses

- “All evidence is prejudicial.”
- “Relevant evidence presumed admissible.”

- “YOUR HONOR I OBJECT, THESE PHOTOS ARE HIGHLY INFLAMMATORY. THE FACT THAT THE VICTIM WAS KILLED AS A RESULT OF A HOMICIDE IS NOT IN ISSUE, ONLY THE QUESTION OF WHO KILLED HIM. THESE PHOTOS SHOW BLOOD AND GORE, AND ARE UNFAIRLY PREDJUDICIAL (Rule 403).”

Possible Responses

- “**Unfairly** prejudicial.”
- “Repetitious.”
- “Unduly gruesome.”
- “Jury entitled to know what happened.”
“Photos reflect the following evidence which is relevant.”

HYPOTHETICAL

This picture is being offered to show the phone number of the driving school.



HYPOTHETICAL

Same picture, but in a tort motor vehicle case, the picture is offered to show the identity of the driver of the car.



Practice Pointer

- Whenever you make a ruling on Rule 403, you must conduct a balancing test on the record.

HYPOTHETICAL

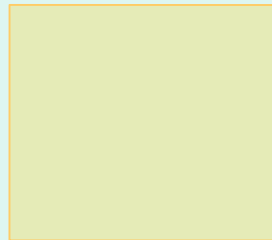
- This picture, found in defendant's wallet, is being offered in defendant's DUI trial to refute defendant's claim that the Heineken bottles found in the car weren't his. (Conduct the balance test.)



HYPOTHETICAL



- What if this were a child abuse case?
(Conduct the balance test.)



HYPOTHETICAL



- On cross-examination, the defense attorney begins her questioning, “Now, you said that the defendant called you at 10:00 p.m.” The prosecution objects, “Asked and answered.”
- What is your ruling?
- What evidence rule guides us?

HYPOTHETICAL

- Defense attorney notifies the court that he has three, new eyewitnesses to call. These witnesses were never disclosed to the plaintiff. Plaintiff is “outraged and surprised” and demands the testimony be excluded. What is your ruling and why?

Different Courses of Action

- Exclude evidence (you should consider the alternatives on the record).
- Admit the evidence, if the opposing party hasn't been prejudiced.
- Admit the evidence, but limit the scope.
- Admit the evidence, but let the opposing party introduce new evidence.
- Offer a continuance or other relief.
- Admit for “Illustrative purposes only”?

HYPOTHETICAL



- The school records have been admitted. The witness is asked by the plaintiff to testify about the attendance records of the plaintiff. The defendant objects, “The document speaks for itself.”

- No hard and fast rule.
- Is it cumulative?
- Is it a waste of time?
- Will it help the jury or serve some useful purpose?
- What if the witness is interpreting the document?

“YOUR HONOR, I OBJECT, THE QUESTION CALLS FOR HEARSAY.”

- Step 1: Is it hearsay?
 - Rule 801 (d)(1)(2).
- Step 2: Offered to prove the truth of the matter asserted?
- Step 3: Does it fall within an exception?

Exceptions to the Hearsay Rule

- BUSINESS RECORDS Rule 803 (a)(6)(7) (RCW 5.45).
- (ER 904 in civil cases).
- EXCITED UTTERANCE.

(continued)

Exceptions to Hearsay Rule

(continued)

- Rule 803 (a)(2).
 - a. Startling event.
 - b. Spontaneous.
 - c. Relating to event.
 - d. Response to question.
 - e. Declarant disavows.
 - f. First hand knowledge.
 - g. Credible.

Exceptions to the Hearsay Rule

(continued)

- MEDICAL DIAGNOSIS/TREATMENT.
- Rule 803 (a)(4).
- STATEMENTS OF:
 - Patient
 - VIA
 - All medical personnel
 - Bystanders
- SUBSTANCE:
 - Condition/diagnosis.
 - Not fault (absent²⁰⁰⁷ need).

HYPOTHETICAL



- The plaintiff's lawyer asks the plaintiff, "And after speaking to the unidentified witness, did you have an understanding as to who hit you?"
- "Objection, hearsay."
- "I'm not asking him what the witness said, your honor, but whether my client came to understand certain facts."

HYPOTHETICAL

- Plaintiff's attorney asks, "And what did the eyewitness to the auto accident tell you?" Plaintiff responds, "She said that the defendant's car did not have its blinker on." Defense attorney, "Objection, hearsay." Plaintiff's attorney, "This is being offered to show state of mind."

HYPOTHETICAL

- Medical record reads:
 - “Pt treated for multiple lacerations and facial fractures related to MVA of 11/15/05.”
 - “Pt involved in a head-on collision.”
 - “. . . with a drunk driver.”

Character Evidence

- As Substantive Evidence
- Rule 404(a)
- Rule 404 (b)

Character Evidence

- As impeachment
- Rule 608
 - a. Reputation
 - b. Specific Instances
- Credibility opinions barred.

- Experts Rule 703:
 1. Scientific, tech or specialized knowledge help?
 2. Yes, then qualified expert may testify.
 3. How is witness qualified?
 - a. Experience
 - b. Skill/knowledge
 - c. Training
 - d. Education

Objections

- “EXPERT IS NOT QUALIFIED.”
 - a. Work exp.
 - b. Training/exp. related field (Harrison 981 F.2d 25).
 - c. Exp. sufficiency relative to purpose (i.e. police meth labs).
- EXPERT LACKS BASIS FOR OPINION.
- Rule 703 liberally construed.
- No basis = speculation.

Objections (continued)

- EXPERT NOT HELPFUL TO TRIER OF FACT.
- Look For:
 - a. Testimony relevant?
 - b. Beyond common understanding?
 - c. Scientific theories forming basis accepted? (**Frye/Daubert** standards)
- EXPERT HAS NOT SATISFIED **FRYE/Daubert** STANDARDS.

HYPOTHETICAL

- Testimony of lay witnesses. Admissible?
- That car was traveling about 30 MPH.
- The plaintiff died of cancer.
- The plaintiff appeared drunk.
- The plaintiff did not appear drunk.
- I own guns, and that sounded like a pistol.
- The costs of my medical treatments were reasonable.

Crawford v. Washington

124 S.Ct. 1354 (2004)

- What does this case mean?
 - Testimonial hearsay?
 - Pretrial confrontation?
 - Excited utterances?
 - Other hearsay exceptions?
 - Does the right to confront, trump a hearsay exception?

Two Ways to Analyze Crawford

Statement testimonial?	Witness available?
Yes; following must occur:	Yes; no <u>Crawford</u> . No: Ask Testimonial?
Witness must testify (other admissible hearsay may then be introduced), or	If testimonial? Show legally unavailable and subject to prior cross. (ER's do apply)
Witness unavailable but subject to prior cross.	

E-mail and the Internet

- Computer-generated evidence is generally hearsay and can only be admitted if it comes within one of the established exceptions to the hearsay rule.

Computer-Generated Evidence

- A showing that the electronic computer evidence is standard;
- Proof that the entries were made at, or near, the time of the event and in the regular course of business.
- Sufficient foundation to convince the trial court that such evidence is trustworthy.

Public Web Sites

- An unauthenticated printout obtained from the Internet does not qualify as a self-authenticating document under Rule 902(e).

Public Web Sites

- 803(a)(8).
- RCW 5.44.040.
- Must be duly certified.
- An unauthenticated printout obtained from the Internet does not meet the public records exception. State v. Davis, 141 Wn. 2d 833 (1989).

Private Web Sites

- Rule 803(a). The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
 - 17) Market reports, commercial publications. Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations. (May depend upon particular state)

Internet Kelly Blue Book

- Generally accepted.
- See State v. Shaw,
120 Wn. App. 847
(2004).